No. 6459.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Commissioner of Internal Revenue,
Petitioner,

vs.

Murphy Oil Company,
Respondent.

REPLY BRIEF.

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REPLY BRIEF.

STATEMENT OF THE CASE.

This case is before the court on a petition to review an order of the United States Board of Tax Appeals entered pursuant to its opinion holding, among other things, that the Petitioner as Commissioner of Internal Revenue (hereinafter sometimes referred to as "Commissioner") had erred in deducting from the capital sum returnable through depletion of Respondent's oil properties the sum of $5,173,595.18 representing a bonus received by the Respondent under a lease to the Standard Oil Company of California. Respondent (hereinafter sometimes referred to as "Taxpayer"), as petitioner before the Board of Tax Appeals, contended that the full amount of the bonus so received constituted taxable income and that therefore no part thereof should be so deducted as a return of capital. The Commissioner of Internal Revenue (respondent before the Board) contended, and does now contend, that in determining Taxpayer's depletion deduction the depletable base of Taxpayer's (petitioner before the Board) oil properties should be reduced by the said sum of $5,173,595.18. The Commissioner's contention is based upon the theory that the bonus payments represented a return of tax free capital, whereas the Taxpayer's contentions are based upon the theory that all the bonus payments constituted taxable income.

QUESTION PRESENTED.

Should the Sum of $5,173,595.18 Received by the Taxpayer From the Standard Oil Company Under the Lease Dated December 1, 1913, Be Deducted in Whole or in Part as a Return of Capital or as Depletion From Taxpayer's Capital Sum Returnable Through Depletion so as to Reduce the Taxpayer's Unit of Depletion for the Years 1919 and 1920.

Statutes Involved.

Act of Oct. 3, 1913 (38 Stat. L. 166-81, C. 16):

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from * * * business, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever * * *.

"That in computing net income for the purpose of normal tax there shall be allowed as deductions: * * * sixth, a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, *in the case of mines, 5 per centum of the gross value at the mine of the output for the year for which the computation is made,* but no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made * * *." (Italics ours.)

Act of Sept. 8, 1916 (39 Stat. L. 756-77, C. 463):

"Sec. 2 (a) [1]. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever."

"Sec. 12 (a). In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources. * * *"

"Sec. 12. (a) Second. [3] (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: Provided, That when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made * * *."

Act of Feb. 24, 1919 (Revenue Act of 1918) (40 Stat. L. 1057-96, C. 18):

"Sec. 213. That for the purposes of this title (except as otherwise, provided in section 233) the term 'gross income'—

"Sec. 213 (a). Includes grains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; * * *."

"Sec. 234 (a) (9). In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: Provided, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date * * *."

STATEMENT OF FACTS.

Neither the Taxpayer nor the Commissioner is questioning any of the material facts found by the Board of Tax Appeals. Those facts were either admitted in the pleadings or based upon a stipulation agreed to by and between the parties litigant. Briefly, those facts material to this issue are:

Taxpayer by a written instrument dated December 1, 1913, leased certain oil properties known as the Whittier and Coyote oil properties to the Standard Oil Company of California [Stipulation R. 53, 181]. Under the terms of this lease the Standard Oil Company of California agreed to immediately begin and carry on an extensive drilling program, and in addition thereto it agreed to and did pay Taxpayer the sum of $5,500,000.00 [Stipulation R. 53, 181] which was paid in installments, the last thereof being paid on December 1, 1918 [R. 238].

Of the $5,500,000.00 payments, the Commissioner determined that $326,404.82 represented payment for the personal properties sold and the remainder of $5,173,595.18 represented a bonus payment on the two properties. The Commissioner allocated such total bonus payments, $656,192.48 to the Whittier property and $4.517,402.70 to the Coyote property, and deducted the amount of such bonuses from the capital sums returnable through depletion in determining the unit of depletion sustained in 1919 and 1920, the years in controversy [R. 239].

The lease reserved to the Taxpayer one-fourth of all the oil produced and saved by the Standard Oil Company on the premises in excess of 730,000 barrels per year in any one year during the first five years from the date of the agreement; after the first five years Taxpayer was to get one-fourth of all oil and kindred mineral substances (except gas) extracted and marketed from the premises by the Standard Oil Company. The Commissioner treated the bonus payments received by the Respondent as a return of capital and deducted from the capital sum returnable through depletion of Respondent's oil properties the total of the bonus payments, to wit, the sum of $5,173,595.18. [R. 240.]

LAW AND ARGUMENT.

The Bonus of $5,173,595.18 Received by the Respondent From the Standard Oil Company of California Under the Agreement of December 1, 1913, Should Not Be Deducted From the Capital Sum of the Respondent Returnable Through Depletion so as to Reduce Respondent's Unit of Depletion for the Years 1919 and 1920.

The Board of Tax Appeals has held that the cash bonus paid by the Standard Oil Company of California to the Taxpayer under the lease agreement of December 1, 1913, in installments from 1913 to 1918, inclusive, was income in its entirety and did not serve to reduce in whole or in part the capital sum of the Respondent returnable through depletion. In other words, the Board has held that the several installments constituting a total of $5,173,595.18 were *taxable income* and *were not a return to the Taxpayer of its capital invested* in oil properties, and that the bonus payments should not be applied in reduction of the capital sum returnable to Taxpayer through depletion so as to reduce Taxpayer's unit of depletion for the years 1919 and 1920.

It is helpful at the outset to make two observations concerning the decision of the Board in this case as follows:

(1)
The Board Followed the Authorities.

In holding that the bonus payments constituted income the Board expressly followed *Nelson Land & Oil Company,* 3 B. T. A. 315; *Henry L. Berg,* 6 B. T. A. 1287; *John T. Burkett,* 7 B. T. A. 560; *R. D. McDonald,* 7

B. T. A. 1078, and *R. H. Hazlett,* 10 B. T. A. 332. (See also *William Farmer,* 1 B. T. A. 711; *J. E. Murphy,* 9 B. T. A. 610.)

Speaking of the *Nelson Land* case, *supra,* the Board said in its opinion:

> "* * * We made it clear that, in our opinion, such a bonus received by a lessor was not a return of capital but is an advance rental or royalty and is taxable as income."

Two of the cases relied upon have been affirmed on appeal. The reference is to *Berg v. Commissioner,* 33 Fed. (2d) 641 (C. A. Dist. Col., June, 1929) certiorari denied 50 Sup. Ct. 14, affirming 6 B. T. A. 1287, and *Burkett v. Commissioner,* 31 Fed. (2d) 667, (C. C. A. 8th December, 1929), certiorari denied 74 L. Ed. 619, affirming 7 B. T. A. 560.

The decision of the Board in the *Nelson Land* case, *supra,* criticized the 1920 edition of Art. 215 of Reg. 45 which was promulgated in January, 1921. Prior to the hearing and decision in the *Nelson* appeal the Commissioner had begun to draw fine lines of distinction in the application of Article 215. In the *Nelson* case, the Commissioner was asserting that the bonus paid was income and not a *"return of capital"*—just the opposite of the position urged by the Commissioner in the case of this Taxpayer. It was said that this obvious inconsistency urged upon the Board was not a disavowal of the regulations since the regulations applied only to a bonus which related to *producing* properties. The Commissioner's contention in support of his inclusion of the bonus in income in the *Nelson* case is expressed by the Board in its opinion in that case as follows:

> "On the other hand, the Commissioner contends that the five leases and the supplemental agreement of May 13, 1919, conveyed no title to the oil and gas in place to the Carter Oil Co.; that the instruments in question merely conveyed to the Carter Oil Co. the right to enter upon the lands and explore for oil and gas; and that the Taxpayer, so far as its capital was concerned, had divested itself of nothing, but, on the contrary, was in the same position immediately after granting the leases as it was before; hence, the amount of the bonus received from the Carter Oil Co. was taxable in full and cannot be regarded as a return of capital."

(See I. T. 2361, C. B. VI-1, p. 73, prescribing a method of treatment of a bonus paid for a lease of a *proven* area different from its treatment of a bonus paid for a lease of an *unproven area.*)

It is plain that the Commissioner felt bound to accept the *Nelson* decision in part and that T. D. 3938, C. B. V-2, p. 117, handed down January 14, 1926, was in partial recognition of the *Nelson Land Company* decision, *supra*. At the same time an attempt was made to avoid, as much as possible, the effect of the decision. All that was done was to avoid the statement in the earlier regulations that "such bonus or other sum shall be regarded as a return of capital to the lessor."

It is Taxpayer's contention that this amendatory regulation is an attempt to circumvent the effect of the *Nelson Land* decision, *supra*.

(2)

The Board Opinion Overrules Treasury Decision 3938.

It is clear from the Board's opinion that it deemed unwarranted by the statute the Commissioner's edition of Article 215 of Regulations 45, as amended by Treasury Decision 3938, *supra,* on November 13, 1926. Referring to this Treasury Decision the Board said in the instant case [R. 246]:

> "If, as we have pointed out, the bonus is income, no part of which represents recovery of capital, it follows that any depletion allowance against such income is a departure from the depletion concept. The regulation relied on by the respondent is clearly such a departure."

The Commissioner, in his brief on this appeal, admits that the bonus was income as held by the Board. (See *Berg. v. Commissioner, supra; Burkett v. Commissioner, supra.*) There is left only the question whether depletion deductions may be allocated to years other than the years of production of oil,—years other than the years of extraction of mineral from the property. The Commissioner's brief is, in effect, an attempt to persuade this Court to allocate part of the depletion allowance to which the Taxpayer is entitled to the years during which the installments of bonus payments were received, all of which years were previous to the taxable years involved in the appeal (1919 and 1920), and prior to the year when depletion was actually sustained.

On page 10 of the government's brief it is stated that

> "If the cash bonus is not to be offset by any depletion allowance, the Board's holding on the current years in this case is correct."

In other words, the sole issue on this appeal now is whether some hypothetical depletion should be taken in *advance of the actual exhaustion or depletion* of the property to which the depletion allowance relates.

PRINCIPAL ARGUMENT.

The Commissioner has made certain statements in his brief to the effect (a) that the Respondent obtains a double deduction under the Board decision, (b) that the bonus payments escaped tax, and (c) that he confessed error *at the Board trial.* These statements are not supported by the record and are, therefore, entirely unwarranted. We shall refrain from characterizing the obvious purpose of these misleading statements. They are dealt with for the information of the Court in Point V.

I.

The Deduction for Depletion Should Be Taken in the Years in Which the Depletion Is Sustained.

The whole position of the Commissioner is that, since the bonus payments were received in advance, the depletion deduction should also be taken in advance. The attempt is made to sustain the 1926 edition of Article 215 of Regulations 45, as amended by Treasury Decision 3938, *supra,* by showing that it is proper to transfer depletion to years other than the years in which depletion takes place. This position is stated at several points in the brief. At page 8 it is said (italics ours):

> "Depletion is only allowed with relation to the exhaustion of the resources, but where royalties are paid in advance of extraction, *the depletion in connection therewith should also be allowed in advance.*"

Again, on page 10, it is said:

> "The decision of the Board of Tax Appeals that the entire cash bonus payment constituted taxable income and that no allowance may be made for depletion is predicated on the theory that no depletion allowance should be made in advance of the exhaustion of the resources."

Again, on page 14, admitting that the issue in the case requires a consideration of the question of the validity of the amended regulation, it is argued (italics ours):

> "The regulation in substance merely provides that where royalties are paid in advance *the depletion deduction in connection therewith should likewise be taken in advance.*"

The Board distinctly held that the regulation the validity of which is at issue on this appeal, in so proposing to transfer the depletion deduction, was *a departure from the depletion concept of the statute.* It says in its opinion [R. 245] (Italics ours):

> "The bonus payment in the instant case was a part of the consideration paid for the lease. While expected production undoubtedly was considered in fixing the amount of the bonus, it is elementary under the laws governing such agreements that its payment did not, in anywise, depend upon, or relate to, production. The lessee's liability therefor was fixed by the terms of the contract. On the other hand, the operation of the principle of depletion depends upon exhaustion of resources through production—i. e., the recovery of capital through its conversion from the form of oil resources or reserves into marketable products or the equivalent received for such product. Under such principle the depletion allowance for the

year or years of the bonus payments can only be measured by reference to the oil produced. If, as we have pointed out, the bonus is income, no part of which represents recovery of capital, it follows that any depletion allowance against such income *is a departure from the depletion concept. The regulation relied on by the respondent is clearly such a departure.* While it might, in some cases at least, produce a more equitable result, the statutory allowance may not be so varied by administrative regulation."

The Board of Tax Appeals is correct in holding that the $5,500,000.00 received by the Taxpayer was not dependent upon production. Its decision is supported by the provisions of the lease which specifically provide that the Standard Oil Company "agrees to further pay independently of the said royalties and said other considerations" the said sum of $5,500,000.00 and that the Standard Oil Company "covenants that it will without delay and well and truly make all of the said payments at the time herein provided," and that "all of said payments shall be paid to the first party at its principal place of business in East Whittier, California, or at such place or bank in California as previously designated by writing addressed to the second party from time to time by the first party, or failing such designation the second party shall make such payments to the credit of first party at a bank of good standing in California, and promptly notify the first party thereof" [R. 181-182]. These provisions in the lease conclusively establish the fact that the $5,500,000.00 was an absolute and unconditional obligation on the part of the Standard Oil Company, not depending at all upon the production of oil in any quantity whatsoever. The Commissioner on page 14 of his brief refers to the provision in the lease for the payment of royalty on the oil produced in each of the first five years as being applicable only to the excess of 730,000 barrels a year as confirming his contention that the bonus payment was directly related to the resources to be exhausted. The bonus payment, as above pointed out, was not dependent upon the production of any oil and certainly was not therefore related to the exhaustion of the resources.

It is the contention of the Taxpayer in this appeal that the Board of Tax Appeals was correct in holding, as it did, that any such construction of the statute would be *"a departure from the depletion concept."*

To decrease the capital sum returnable to the Taxpayer through depletion *is to lower the Taxpayer's depletion unit for 1919 and 1920—the taxable years—and deprive it of depletion in those years.* To do so, because the Taxpayer had received in years prior to the taxable years involved, bonus payments for an oil lease is to disregard wholly and absolutely the very basic idea of depletion.

The Revenue Act of 1913 for the first time permitted a deduction for depletion in the following language:

> "In the case of mines, a reasonable allowance for depletion of ores and all other natural deposits, not to exceed five per centum of the gross value at the mine of the output for the year for which the computation is made." (Subdivision G (b), Section II, Revenue Act of 1913, 38 Stat. 114,166) Revenue Act of 1913, approved October 3, 1913.

The Revenue Act of 1916, as amended by the Revenue Act of 1917, in allowing for a deduction for depletion, provided:

> "In the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow." (Section 5, Paragraph Eighth (a), Part I, Title I, Revenue Act of 1916, approved September 8, 1916, 39 Stat. 756. Revenue Act of 1917, approved October 3, 1917, 40 Stat. 300.)

The Revenue Act of 1918, approved February 24, 1919, contained the following provisions for depletion:

> "In the case of mines, oil and gas wells * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted." (Sec. 234 (a) (9), Revenue Act of 1918, 40 Stat. 1057.)

The noun "depletion" is defined in Webster's New International Dictionary as:

> "Act of depleting, state of being depleted."

The verb "deplete," according to the same authority, means:

> "To reduce by destroying or consuming the vital powers of; to exhaust, as a country of its strength or resources; a treasury of money, etc."

The absolute condition precedent to the allowance of the deduction for depletion is the exhaustion or consumption of the reserves subject to depletion. Nothing can be the subject of a depletion allowance until it is, in fact, exhausted or consumed. There was no exhaustion in this case of the mineral resources of the Respondent by reason of the bonus payment. There can be no exhaustion or consumption of the mineral property prior to production therefrom. Production is what exhausts or consumes. *This is the vital concept underlying the statutory allowance for depletion from which the Board has refused to depart.* (*Lynch v. Alworth-Stephens Co.*, 267 U. S. 364; *United States v. Ludey*, 274 U. S. 295; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503; A. R. R. 1147, C. B. I-2, p. 138; A. R. M. 148, C. B. I-1, p. 186.)

In the recent case of *United States v. Ludey*, 274 U. S. 295, the Supreme Court had under consideration the matter of depletion under the Revenue Act of 1916. With reference to the nature of the deduction for depletion, Mr. Justice Brandeis, speaking for an undivided bench, used the following language (italics ours):

> "The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents *the reduction in the mineral contents of the reserves* from which the product is taken. The reserves are recognized as wasting assets. The depletion *effected by operation* is likened to the using up of raw material in making the product of a manufacturing establishment. As the cost of the raw material must be deducted from the gross income before the net income can be determined, so the estimated cost of the part of the reserve used up is allowed."

The following emphatic statement was made by the court in *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364 (italics ours):

"In the case of mines, a spectific kind of property, *the exhaustion is described as depletion, and is limited to an amount not exceeding the market value in the mine of the product mined and sold* during the year. The interest of respondent under its leases in the mines being property, its right to deduct a reasonable allowance for exhaustion of such property, *if there be any,* during the taxable year, results from the plain terms of the statute, *such deduction,* since the property is an interest in mines, *to be limited to the amount of the exhaustion* of respondent's interest *caused by the depletion of the mines* during the taxable year. We agree with the Circuit Court of Appeals (294 Fed. 194) that 'the plain, clear, and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to everyone whose property right and interest therein have been depleted *by the extraction and disposition* "of the product thereof which has been mined and sold during the year for which the return and computation are made."' And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

In A. R. R. 1147, C. B. I-2, p. 138, it is said:

"A taxpayer who received during 1917 advance royalties on coal to apply against future mining operations was not entitled to depletion deduction from income because no coal had been extracted."

In A. R. M. 148, C. B. I-1, p. 186, it was stated (italics ours):

"* * * Where no mineral is produced upon the premises it follows that *the interest of the taxpayer in the mineral reserves is not affected* and that no allowance can be made for depletion. Under such conditions to treat the annual payments of 50X dollars each as a return of capital would be the equivalent of making an allowance for depletion *when no depletion has been sustained.*"

It is settled that there is no inherent right to a depletion allowance. The deduction is a matter of legislative grace (*Burnet v. Thompson Oil & Gas Co., supra,* and cases cited on page 12 of Petitioner's Brief). Once embodied in the statute, however, the depletion provision must be construed according to the terms of the Act and the word "depletion" must be given its ordinary and usual meaning (*DeGanay v. Lederer,* 250 U. S. 376; *Lynch v. Alworth-Stephens Co.,* 267 U. S. 364). That meaning, as pointed out in the decisions of the Supreme Court from which a quotation has just been made, involves the *exhaustion or reduction of the mineral content.* There can be no depletion without this physical process of exhaustion. Without exception from the 1913 Act to date, there have been no Court decisions and no Treasury Department ruling which have allowed depletion in the absence of actual exhaustion of the properties. In order to prevail upon this appeal Petitioner must show as a basic premise that under the plain terms of the statute depletion is allowable without exhaustion.

The Commissioner and Taxpayer are in thorough agreement on the fundamental proposition that each year must be treated separately for tax purposes. (*Lucas v. American Code Co.,* 280 U. S. 445; *Burnet v. Thompson Oil & Gas Co.,* 283 U. S. 301, both cited for this point on page 19 of Petitioner's Brief.)

The argument of the Commissioner is that this fundamental principle of income taxation should be departed from in this case to provide a "more logical rule" (page 13) and to afford "a more equitable and a more reasonable means of connecting the depletion deduction with the income received from the depletable estate" (page 17).

The Board dealt specifically with this argument in its opinion when it said (Record, page 246):*

> "While it (the regulation relied upon) might, in some cases, at least, produce a more equitable result, the statutory allowance may not be so varied by administrative regulation."

Precisely this argument has been before the Supreme Court and has been disposed of by that Court. In *Burnet v. Thompson Oil & Gas Co.,* supra, the question involved was whether in determining depletion under the 1918 Act there should be deducted from the capital sum, the capital value recoverable through depletion, depletion actually sustained in earlier years or only so much of such depletion as was allowable as a deduction under revenue acts in force in earlier years. The deduction permitted for earlier years fell about $85,000 short of the sustained depletion—the amount by which the reserve was exhausted. The taxpayer argued that only the depletion allowed should be used to reduce the capital sum. The Commissioner argued that the entire amount sustained should reduce the capital recoverable.

Analyzing the contention of the taxpayer in that case, the Supreme Court held that the taxpayer was in effect

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*It should be noted that the Board was careful to say "in some cases, at least." The Board undoubtedly had in mind the fact that in many cases not difficult to imagine the rule urged by petitioner on this appeal would have a distinctly inequitable effect.

trying to make up in 1918 the depletion sustained but not allowed in earlier years as a deduction,—*that it was attempting in 1918 to obtain a deduction for depletion not sustained in 1918.* The court held emphatically that only the sustained depletion of 1918 was allowable, saying:

> "The tax is an income tax for 1918 and in the absence of express provision to the contrary, it is not to be supposed that the *taxayer is authorized to deduct from that year's income, depreciation, depletion, business losses or other similar items* attributable to *other years* * * *. The construction adopted by the court below, in effect, results in including in the taxable year items referrable to other years, and is contrary to the theory of a tax for specific years.
>
> "The nature of the tax as one for annual periods has been repeatedly mentioned in dealing with its application in various situations. The taxable year 1918, and that only, is involved, and deductions applicable to that year only should be allowed." (Italics ours.)

The Supreme Court in thus refusing the taxpayer in the foregoing case the deduction of depletion not sustained in the taxable year announced a principle which is conclusive of the real issue in this case. If taxpayers are not permitted in 1918 to take a deduction for depletion sustained in years other than 1918, as was held by the Supreme Court in the *Thompson Oil & Gas Co.* decision, supra, it certainly follows that they are entitled in 1918 to a deduction for all depletion sustained in 1918. Depletion sustained in that year can no more be thrown back to earlier years than can depletion sustained in earlier years be brought forward to a later year.

Another case, not cited by the Petitioner, is *Burnet v. Sanford & Brooks Company,* 282 U. S. 359. In that case the taxpayer sought to apply certain expenses of a government contract to the year in which it recovered by suit in the courts a substantial sum due under the contract. The Supreme Court, disposing of this contention, said:

> "The excess of gross income over deductions did not any the less constitute net income for the taxable period because respondent in an earlier period suffered net losses in the conduct of its business which were in some measure attributable to expenditures made to produce the net income of the later period."

All of these cases (including the cases cited by the Maricopa Investment Co.) are to the same effect. They refuse to permit items of deduction to be juggled between the years. Each year stands on its own feet. The Commissioner and Taxpayer are agreed on this point and the question is whether this fundamental principle of income taxation so agreed to can be departed from by allocating depletion to a year in which it has not been sustained. Neither the Commissioner nor the Taxpayer is clothed with power to shift income or deductions from one year to another according to their respective ideas of logic, accounting or economic theory. (See *Bank of Commerce,* 10 B. T. A. 73, 76; *The Joyce-Koebel Co.,* 6 B. T. A. 403; *Even Realty Co.,* 1 B. T. A. 355, 362.)

The contentions of the Commissioner are reducible to a very simple analysis. In effect, the Commissioner says: You received a substantial income from the properties prior to 1919 and 1920, the taxable years involved, and you should be willing to transfer a substantial part of the depletion deduction sustained in 1919 and 1920 to those earlier years when you received that income. You should allocate depletion not in the years in which it occurs but in the years in which you receive income.

Both depreciation and depletion are matters of fact. (*Hotel de France Co.*, 1 B. T. A. 28.) Whether they occur is a question of fact. There should be no deduction for or on account of them until they occur. If a taxpayer owning a building leased the building and then sought to spread depreciation in accordance with the income from the building, he would be met by a prompt denial of the right. It would be urged that his depreciation must be taken when and as the building deteriorated. He would have no reasonable hope of allocating a larger amount of depreciation to a year in which his profits from the building were larger than usual. The Commissioner has specifically denied taxpayers this right.

In interpreting the provisions of the Revenue Act of 1926, the Commissioner in I. T. 2369, C. B. VI-2, p. 63, stated:

> "The deduction of an allowance for depreciation is not in any way dependent upon the amount of income derived from the property during the taxable year. Depreciation may be deducted even though no income is realized from the property in respect of which the depreciation is claimed."

The same considerations obtain with respect to depletion. The Taxpayer's income from the properties in question was substantial in the years 1913 to 1918, inclusive, when the bonus payments were received. But that would not have entitled the Taxpayer to allocate to those years depletion which did not occur in them.

If we imagine the rates of income tax to have been higher in those years so that the Taxpayer would have been anxious to secure heavy depletion in the years 1913 to 1918, it is not difficult to imagine the Commissioner's answer to such an attempt to secure depletion in advance of exhaustion. In this case, the situation is reversed. The rates of tax were low from 1913 to 1916 and at no time prior to January, 1921 was any depletion allowed on bonus payments received by the Taxpayer. Nothing would be more inequitable than to transfer depletion to those prior years in which no advantage can be taken of it and to deny depletion in the years when it actually occurred.

The 1926 edition of Article 215, the validity of which the Commissioner is attempting to support on this appeal, is in plain and unmistakable disregard of the unequivocal statutory provision. The statutory provision allows for depletion in the year sustained. The Respondent in this case is contending for its full quota of depletion for 1919 and 1920 when the process of reduction of minerals took place. The effect of reducing the capital sum by the amount of the bonus is admittedly to allocate to a previous year some of the depletion sustained in 1919 and 1920. Instead of securing a double deduction, the Taxpayer will be deprived of part of the deduction to which it is plainly entitled under the statute. The Supreme Court has held (*Burnet v. Thompson Oil & Gas Co.*, supra) that it would not be permissible to deduct in the years 1913 to 1918 depletion which did not occur in those years. It follows that the Respondent should be permitted the deduction in the years 1919 and 1920 of depletion then sustained.

II.

The Cases Cited in Briefs of Petitioner and Amicus Curiae for Maricopa Investment Company Do Not Compel Conclusion That Depletion May Be Offset Against Income Regardless of Actual Exhaustion.*

The cases cited by the *amicus curiae* are all Board opinions, and this appeal is from a Board opinion alleged to be inconsistent. The Respondent does not think there is any inconsistency; the cases may be readily distinguishable. The points involved in the several cases may be briefly summarized as follows:

Appeal of R. M. Waggoner, 5 B. T. A. 1191.

All that the Waggoner cases decided was that 485,535.34 barrels of oil were *extracted* but the petitioner as lessor of the property received royalties in the taxable year of only 280,523.71 barrels. The depletion allowance must be based on the 280,523.71 barrels. In other words, the income from the sale of 280,523.71 barrels could not be considered as the return of capital on 485,535.34 barrels.

National Oil & Gas Co. v. Commissioner, 6 B. T. A. 399.

In this case 26,843.56 barrels were *produced* and payment received by the taxpayer, who was on a cash receipts and disbursements basis, for only 23,929.97 barrels. Depletion was based on the 23,929.97 barrels, the Board following its previous decision in the *Waggoner* case.

Inspiration Consolidated Copper Co., 11 B. T. A. 1425.

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*The only amicus curiae brief received by respondent is that on behalf of Maricopa Investment Company.

The taxpayer in this appeal was on the accrual basis and *produced* 98,540,041 pounds of copper during the taxable year, but sold only 70,694,324 pounds. It was held that depletion must be based on the amount sold and not on the greater amount *produced*, 70,694,324 pounds.

Appeal of Clearfield Lumber Co., 3 B. T. A. 1282.

Inventories which were used in this case in computing the annual profit and loss were required to be stated in terms of logs sold and not in terms of logs cut. In other words, depletion was not allowed in full in the year in which the timber was cut but was allowed in the year in which the timber was sold and only to the extent that such timber was sold.

These cases fall far short of proving that where there is *no* production or exhaustion depletion may nevertheless be allowed against income. If anything, they prove the opposite. In other words, depletion was to be allowed *if actually sustained*, but only to the extent that there was income in the taxable year from the sale or other disposition of such depletable assets. As a matter of fact, the Board says in the case of *Inspiration Consolidated Copper Co.*, quoting from its earlier decision in the *Clearfield Lumber Company* case, that (italics ours)

> "The real purpose to be accomplished is so to adjust the accounting that the depletion allowance shall include a return of the cost of capital assets plus the excess of March 1, 1913 value over cost, *and that that depletion allowance should be made available as a deduction only when the timber cut or the mineral extracted is sold.* This result is accomplished by the method pursued by the Commissioner in this case."

The basic error to which the petitioner has fallen is illustrated by his reference to the cases just analyzed above. This may be demonstrated by reference to his brief, page 15, in which he says:

> "The right to depletion * * * and as to amount is limited by, and directly connected with, the extraction (*Burnet v. Thompson Oil & G. Co.*, supra), but the time for taking the depletion is the time at which the royalties are paid. That is to say, the depletion deduction must be taken at the time the income from the leased properties is received. *R. M. Waggoner et al.*, 5 B. T. A. 1191; *Inspiration Consolidated Copper Co.*, 11 B. T. A. 1425."

It is apparent that the Commissioner has completely ignored the basic concept laid down in *Thompson Oil & Gas Co.*, and *Waggoner* cases, supra, that *before there can be a deduction for depletion there must be exhaustion.* The mere fact of receipt of income does not permit an allowance for depletion.

III.

The Construction Urged by the Petitioner and Amicus Curiae Amounts to a Reenactment of the Statute.

Beginning on page 13 of the brief *amicus curiae,* the argument is made at some length to the real effect that this Court should rewrite the Revenue Act of 1918, making it more "equitable and practicable." The *amicus curiae* cites imaginary cases in which grave injustice might be done by the application of the principle involved in the Board's decision in the instant case. The same argument is made at pages 13, 17 and 18 of Petitioner's Brief; he would have the act more "logical" and "equitable," and "reasonable."

The *amicus curiae* argues that "taxation is an intensely practical matter" and that "so far as possible, unjust and oppressive consequences" should be avoided (citing *Farmers Loan & Trust Company v. Minnesota,* 280 U. S. 204, and *Tyler v. U. S.,* 281 U. S. 497). The case of *Commissioner v. Stephens Adamson Mfg. Co.,* decided July 27, 1931, by the United States Circuit Court of Appeals for the Seventh Circuit, is also quoted to the effect that the court should not ignore, in construing a revenue act, "the ordinary every-day commercial experiences which constitute its background."

These general statements do not help very much. A tax law could hardly be imagined which might not in conceivable circumstances work hardship or injustice. But that is no reason for ignoring the intention of the Legislature apparent upon the face of the statute. Arguments as to the expediency of a tax law or the possible economic mistake involved in the tax imposed thereby or inequality thereof are beyond judicial cognizance. (*Brushaber v. Union Pacific,* 240 U. S. 1; *Weeks v. Sibley,* 269 Fed. 155.)

It was not possible to rewrite the 1913 statute because it provided for the deduction of less depletion than was sustained.

As observed by the court in *New Creek Co. v. Lederer,* 295 Fed. 433, cert. den. 265 U. S. 581:

> "We are not persuaded by this contention because the plaintiff is only entitled to the allowance which the statute gave it and the statute did not give it an allowance for the precise depletion of its mine. It gave it a reasonable allowance for depletion, having

> regard, of course, to the impossibility of absolute precision in estimating depletion of a taxable asset of the character of a mine."

Payments of compensation for activities extending over many years are frequently harshly subjected to tax in one year. But the courts do not attempt to substitute their will for that of Congress. (*Jackson v. Smietanka*, 272 Fed. 970; *Woods v. Lewellyn*, 252 Fed. 106.)

In *United States v. Phellis*, 257 U. S. 156, the answer to these arguments of petitioner and the *amicus curiae* was clearly indicated in the following language:

> "The possibility of occasional instances of apparent hardship in the incidence of the tax may be conceded."

In *Mente v. Eisner*, 266 Fed. 161 (cert. den. 254 U. S. 635), the Circuit Court of Appeals, Second Circuit, said (italics ours):

> "There is an inconsistency in making profits derived from such transactions a part of the taxpayer's gross income and, on the other hand, allowing him no deductions for losses; *but tax laws are not required to be perfect or even consistent.*"

In *Weiss v. Weiner*, 279 U. S. 333, the court said:

> "The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or business man would take into account. * * *"

In many instances the taxable year as a unit of time will necessarily effect hardship. Congress has seen fit in certain cases to eliminate this hardship. It did so in the net loss provision, which was first inserted in a limited way in the Revenue Act of 1918 and has been carried through all subsequent Revenue Acts. (See Sec. 204, Revenue Act of 1918; Sec. 204, Revenue Act of 1921; Sec. 206, Revenue Act of 1924; Sec. 206, Revenue Act of 1926; and Sec. 117 Revenue Act of 1928.) In many other respects, Congress has based curative amendments upon the wisdom gained by administration and experience. But it is the function of Congress to make these changes, not this Court.

The pertinent provisions of the Revenue Act of 1918 governing depletion are perfectly plain. There is no statutory authority for deducting depletion for any year other than that in which it is sustained. The Commissioner and the *amicus curiae* in this case are asking this Court to usurp the function of Congress and to write a provision in the statute which Congress, for whatever reasons may be, did not insert. The function of this Court is to interpret, not to enact, and the argument of the Petitioner and of the *amicus curiae* should fail.

The Maricopa Investment Company in its *amicus curiae* brief complains because the Commissioner is attempting to impose a tax on a bonus received by it in 1920.

IV.

The Rules of Statutory Construction Cited by Petitioner and the Amicus Curiae Are Valueless in the Instant Case.

Reference may be made to the argument on page 22 of the Petitioner's Brief, citing *Brewster v. Gage,* 280 U. S. 327, and *Maryland Casualty Co. v. U. S.,* 251 U. S. 342, 349. The brief refers to the long established rule of statutory construction that reasonable regulations promulgated by administrative officials have the force of law. This principle is not open to question. In the present appeal it is entirely question-begging. The question is whether the particular regulation at issue was "reasonable." For just as reasonable regulations promulgated by administrative officials have the force of law as argued by the petitioner, so also is it equally true and well-established that a statutory grant of power to an administrative officer of the government, such as the Commissioner of Internal Revenue, to prescribe regulations, *does not authorize the officer to alter, amend or enlarge the statute.* (*Morrill v. Jones,* 106 U. S. 466; *United States v. United Verde Copper Co.,* 196 U. S. 207; *Williamson v. U. S.,* 207 U. S. 425.

The argument contained on pages 5 to 7 of the brief of the *amicus curiae* is disposed of by the rule of statutory construction that regulations cannot be permitted to modify the statute. It is immaterial that a reversal of departmental construction may cause inconvenience. If the regulation is invalid, it cannot be defended. Taxpayers are bound to know the law (*Maas & Waldstein v. U. S.,* 37 Fed. (2d) 196, Court of Claims, affirmed 283 U. S. 583) and reliance upon an illegal regulation gives them no position to hold anyone responsible. The government is not estopped when the taxpayer relies upon an invalid regulation. Such a regulation creates no equities in favor of taxpayers. (*Goldfield Consolidated Mines Co. v. Scott,* 247 U. S. 126; *American-LaFrance Co. v. Riordan,* 294 Fed. 567; *United States v. Lamson,* 162 Fed. 165.)

On pages 4 and 5 of the brief *amicus curiae,* it is argued that the re-enactment of the depletion provisions in the Revenue Acts of 1921, 1924 and 1926 on November 23, 1921, June 2, 1924, and February 26, 1926, respectively, must be deemed to be a tacit approval of Article 215 of Regulations 45 as originally promulgated in 1920. Curiously enough the Commissioner makes the same argument to reach another conclusion on page 22 of his brief. The *amicus curiae* is interested in securing the approval by this Court of Article 215 of Regulations 45, 1920 Edition, so he argues that the enactment of the 1921, 1924 and 1926 Acts constitute an approval of that edition of the regulations. The Commissioner is anxious to secure the approval by this Court of Article 215 of Regulations 45 as amended by Treasury Decision 3938, supra, so he argues that the enactment of the Revenue Act of 1928, passed after the amendment contained in Treasury Decision 3938, demonstrates Congressional approval of Article 215 *as amended.* These two arguments, essentially the same in principle, reach two opposite results and illustrate how little can be gained in this instance from this rule of statutory construction.

It is a little curious that these rules of statutory construction should have been invoked by the Commissioner in this case. They might have some weight in a case in which the Commissioner had formulated a regulation and adhered consistently thereto. But the Commissioner has changed his mind twice in respect of the subject of the particular regulation the validity of which is at issue on this appeal, and which he now urges should be given the force of law. The Commissioner, on page 12 of his brief, states that his "original" ruling to the effect that a bonus was return of capital was contained in Article 215 of Regulations 45, which, as heretofore indicated, was promulgated in January, 1921. Prior to that time, of course, bonus payments were treated as taxable income. In his Regulations 33 promulgated under the Revenue Act of 1916 as amended by the Revenue Act of 1918 it is provided that

> "Royalty paid to a proprietor by those who are allowed to develop or use property, or operate under some right belonging to him, is to be accounted for as income."

To the same effect also see A. R. M. 148, C. B. I-1, page 186. In promulgating Article 215 (a) of Regulations 45, 1920 Edition, the Commissioner changed the theory of the law as well as his own regulations on this point. In this regulation (Petitioner's Brief p. 26) it is stated that a bonus or other sum in addition to royalties "shall be regarded *as a return of capital* to the lessor * * *." The Commissioner changed his mind again in November, 1926, and ruled in Treasury Decision 3938, supra, amending Article 215 of Regulations 45, 1920 Edition (Petitioner's Brief pp. 27-28), that a bonus was *income*. Which of the Commissioner's interpretations is to be respected? Does such a fluctuating interpretation of a statutory provision deserve recognition as having the force of law?

V.

The Petitioner Has Made in the Brief Certain Allegations of Fact Which Are Immaterial, Unwarranted and Untrue.

(a)

At two places in this brief, the Respondent distinctly urges upon this Court the argument that the Respondent under the Board's decision appealed from its obtaining a *double deduction.* On page 9 it states that if "the Board is right, the result is that the taxpayer in this case will actually obtain a double deduction." Again on page 23, substantially the same statement is made, the argument being that the taxpayer should not have a "second deduction in 1919 and 1920."

These statements are entirely without foundation and wholly unwarranted. The first installment of the bonus payments was received in 1913, the last in 1918.

Under the Commissioner's interpretation of the Revenue Acts in force during the period when the installments of bonus were received, the bonus was regarded as *income* and no depletion was allowed to be set off against it because "The interest of the Taxpayer in the mineral reserves was not affected." (See A. R. M. 148, C. B. I-1, p. 186; A. R. R. 1147, C. B. I-2, p. 138.) It was not until the promulgation of Article 215 of the 1920 Edition of Regulations 45 that the Commissioner held bonus payments to be *capital,* as distinguished from *income.* In that regulation, issued January 18, 1921, pursuant to the Revenue Act of 1918, it was ruled that the bonuses constituted a return of capital. This regulation remained in effect until November, 1926, when it was amended by Treasury Decision 3938, *supra.* Even this 1920 edition of Article 215(a) of Regulation 45 was held by the Commissioner inapplicable to years prior to January 1, 1918, as of which date the Revenue Act of 1918 took effect. (See A. R. M. 1147, C. B. I-2, p. 138.)

In the face of this interpretation of the statutes in effect at the time the bonus installment payments were received, it is nothing short of absurd for the Commissioner now to contend that under the Board's holding a double deduction is obtained. The Respondent obtained no deduction with respect to the installment payments. If it obtained no deduction it cannot be given in later years a second or double deduction. It could not secure a deduction in the years in which the payments were received *for the reason that the Commissioner would not permit a deduction in those years.* The Commissioner can hardly be heard to say at this time, in view of his own prohibition of an original deduction, that the Taxpayer seeks a second or double deduction.

(b)

The Petitioner attempts also to show that the bonus payments received from 1913 to 1918, inclusive, escaped tax. On page 9, the Petitioner says that the "Taxpayer paid no income tax thereon (on the bonus) in those years (1913 to 1918, inclusive)." Again on page 12, the Petitioner's Brief states:

> "The original ruling of the Commissioner pursuant to this provision was contained in Article 215, Regulations 45, 1920 Edition, *infra,* and was to the effect that the entire advance royalty should be applied to reduce the base and thus constitute a nontaxable return of capital if the base be as large as the bonus. On the date of the mailing of the notice of deficiency in this case, this Regulation was in force and the base was accordingly reduced by the entire amount of the bonus. Hence the Taxpayer paid no taxes due to the receipt of the $5,000,000 bonus."

The Petitioner specifically tells this Court, on page 9 of its brief, that "Under regulations *in effect at the time* *the bonuses were paid*" the bonus payments were considered as a return of capital. Yet on page 12 Petitioner states that the original ruling was made by the Petitioner in his Regulations 45 (promulgated in 1921, *at least two years after the final payment of the bonus had been made*). The ruling in effect at the time the bonuses were paid treated them as *income*. (Reg. 33, supra.) Since they were income under the Revenue Acts then in effect and under rulings of the Commissioner, it is to be presumed that tax was paid upon them. A tax was actually paid on them.

The bonus payments did not escape tax. Moreover, there is no excuse for such arguments. It is utterly immaterial in this proceeding whether or not the bonus payments were subjected to tax. This Court is concerned on this appeal with the tax liability for the years 1919 and 1920 and it is a palpable attempt to mislead to argue the point whether the payments were subject to tax in some other years. The record is properly silent on the point. The Commissioner is not supported by the record.

(c)

On page 23 of its brief the petitioner admits that he committed error in the 60-day letter dated February 6, 1926, from which appeal was taken to the Board of Tax Appeals in deducting the *entire* bonus from the capital sum returnable through depletion. The error admitted is that in so deducting the entire bonus the Commissioner failed to follow Article 215 of Regulations 45, as amended by Treasury Decision 3938, supra. The Petitioner argues that this admitted mistake was "due to the fact that the original regulation was not amended until 1926." The fact is that it was amended in November, 1926, a good many months after the deficiency letter was mailed—February 6, 1926. The Petitioner's Brief goes on to say (page 23) (italics ours):

> "The Commissioner *at the Board trial* in this case confessed error as to this treatment in the prior years and showed a willingness to adjust the depletion base in accord with the amended regulation but was unable to do so because there was nothing in the record to show what royalties were expected to be received over the lives of the leases."

Also on page 13 it is said (italics ours):

> "*At the trial of this case* it was conceded that this portion of the bonus should be substituted as a depletion deduction rather than the entire amount of the bonus * * *."

As an authority for this statement the Petitioner's Brief refers, on page 23, to pp. 244 and 245 of the record. These pages of the record set forth the Board's opinion. The Board, in its opinion, refers to a confession of error made by the Commissioner *in his brief*. This brief was filed many months after the hearing of the case on October 22, 1928. The minutes of the hearing or trial of October 22, 1928, are wholly silent as to any confession of error and no confession was made until the government's brief was filed. The statement on page 23 of Petitioner's Brief as to a confession of error *"at the Board trial"* is therefore not supported by the record. This alleged confession, however, tends to emphasize the weakness of the Commissioner's position.

SUMMARY.

It has been shown that a deduction for depletion should be taken only in the years in which the depletion is sustained. This is the only true concept of depletion and is a true interpretation of the Revenue Acts. It has also been shown that bonus payments, which are not dependent upon production, may not be offset by depletion and particularly when the actual depletion occurs years after the receipt of such payments. It has further been shown that there is no support in the law for the Commissioner's position and that his amended regulation is, as the Board stated, entirely unjustified. This regulation is merely an attempt to legislate, which is a usurpation of the functions of Congress.

As the Supreme Court in the Burnet case, supra, was concerned with how much of the oil reserve remained at the beginning of the taxable year to be depleted, so we now before this Court are concerned with how much oil reserve of the Taxpayer remained at the beginning of the taxable years (1919 and 1920) to be depleted. At the beginning of the taxable years herein involved Taxpayer had whatever mineral reserve it had on the basic date less the amount actually extracted. Its depletable base, returnable through depletion, was not in fact or in law depleted, lessened or exhausted by the receipt of the bonus payments. These bonus payments, as the Board held, and as has heretofore been pointed out, were by the very terms of the lease, made payable unconditionally. That is to say, these payments were not in any wise dependent upon extraction or production. How, therefore, can it logically be said that Taxpayer's depletable base was reduced by the receipt of these bonus payments? The receipt by the Taxpayer of these bonus payments did not any more reduce its depletable base than a similar bonus derived by an owner of a building. Why should a lessor of oil property, receiving a bonus, be favored above lessors of all other kinds of property? A lessor of a building receiving a bonus certainly is not permitted to apply that bonus against the basic cost of the building. The Commissioner himself has specifically held that the deduction for depreciation is not in any way dependent upon the amount of income derived from the property during the taxable year.

If the allowance for depreciation is not in any way dependent upon the amount of *income* derived from the property during the taxable year, then certainly the allowance for depletion is not in any way dependent upon the amount of *income* derived from the property during the taxable year. To deny the *depreciation* deduction to be allocated over years other than that in which sustained, and yet compel this Taxpayer to allocate its *depletion* actually sustained in 1919 and 1920 to the prior years merely because of the receipt of the bonus payments is an arbitrary and capricious discrimination against this Taxpayer.

Reduced to its real outlines the argument of the Commissioner virtually answers itself. He would grant depletion in the years 1913 to 1918, which are not before this court. He is not really interested in granting to the Taxpayer any depletion in the years 1913 to 1918; that is obviously impossible at this late date. The real purpose is to *deprive* the Taxpayer of depletion in the years 1919 and 1920, which are before the Court.

The Commissioner is attempting in this roundabout way to violate the theory of the statute which gives a depletion allowance on account of the "reduction of the mineral contents of the reserve" (see *United States-Ludey,* supra, and other authorities dealing with the concept of depletion). All other arguments are extraneous. Rules of statutory construction cannot avail to accomplish a modification of the statute. Arguments as to what should be are irrelevant. The point is: What did Congress provide? The Supreme Court in the *Thompson Oil and Gas case,* supra, has answered this question. Congress in no uncertain terms provided that depletion should be allowed as a deduction *when sustained.* The decision of the Board in this case should therefore be affirmed.

Respectfully submitted,

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